No. 43915-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

VICTOR WHALEN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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2. Should the Court refuse to consider Whalen's appearance-of-fairness claim based on the judge's alleged conflict of interest, raised for the first time on appeal?

3. Would an objective observer believe that the court below fairly sentenced the defendant, even though the defendant emphasized his personal connection to the judge and stated that the judge had represented him some thirty years before?

II. INTRODUCTION

Victor Whalen appeals his conviction of attempted motor vehicle theft. In June of 2012, a sheriff's deputy saw him run from a car that had been broken into. He was wearing a distinctive sweater at the time, which he was still wearing when discovered in the area a few hours later. The jury convicted Whalen based on circumstantial evidence and his own statements. On appeal, Whalen challenges the sufficiency of the evidence and argues, for the first time on appeal, that the trial court could not fairly have sentenced him because Whalen allegedly had personal connections to the judge. However, the jury could easily conclude from the evidence that Whalen was guilty, and the record does not reveal any violation of the appearance of fairness, let alone a

manifest error affecting a constitutional right. The Court should affirm Whalen's conviction.

III. STATEMENT OF THE CASE

At around 1:30 a.m. on June 12, 2012, Lewis County Sheriff's Deputy Taylor was driving by a gravel parking lot on South Scheuber Road in Lewis County, WA, where it was common for car owners to park cars they were advertising for sale. Verbatim Report of Proceedings (VRP) (Aug. 15-16, 2012) at 81–82. Dep. Taylor noticed an Isuzu Rodeo parked there with its emergency flashers on. *Id.* at 82. The deputy had driven by a few times earlier in his shift, and the Isuzu's flashers had not been on. Dep. Taylor turned into the parking lot. *Id.* As he approached the Isuzu, he saw someone crouched down, moving along the passenger's side of the vehicle. The person stood up when he got to the front of the car and ran across the road into a field. *Id.* at 82-83. Although he wasn't able to see the person's face, Dep. Taylor saw that the person was wearing a dark shirt or coat with red or dark orange stripes on both sleeves. *Id.* at 83, 85.

Dep. Taylor thought he had interrupted a car break-in. He activated his emergency lights, turned his spotlight out into the field into which the subject was running, and yelled for the person to

stop. *Id.* at 83-84. Radioing for backup, the deputy followed the suspect out into the field but lost him in the briars and swampy, tall grass. *Id.* at 84. The area used to be part of the river, with standing water reaching to just below the ankle. *Id.* at 84, 87.

A canine unit arrived. *Id.* After some unsuccessful attempts, the canine eventually found a scent track that led to a white car parked on a nearby road. *Id.* at 87-89; 104-07. The white car was unclaimed, and so was impounded. *Id.* at 89.

In the meantime, other officers had arrived to investigate. *Id.* at 86. Dep. Mauermann arrived only a few minutes after Dep. Taylor and examined the Isuzu, which had "for sale" paperwork in the window. *Id.* at 18, 34. The front passenger door's keyhole had been punched out, as though with a screwdriver. *Id.* at 18, 56, 76. The plastic around the car's steering column had been ripped off. *Id.* at 57, 76. On the driver's seat was a screwdriver; a second screwdriver was lying on the driver's side floorboard next to screws removed from the steering column. *Id.* at 57. The ignition had a piece of screwdriver broken off inside of it, and was cracked so that the car's key would no longer fit in it. *Id.* at 76, 79.

Dep. Mauermann retrieved the car's owner, Richard Leventon, who identified the car as his. *Id.* at 76-77. Leventon had

left the car at that location to sell it; it had been locked, clean, and in good repair when he left it there. *Id.* at 74-75.

Some 5 hours later, at around 7:00 a.m. on June 12, 2012, Centralia Police Department Officer Lowrey was driving home, having just come off duty. *Id.* at 114. About a quarter mile from where the Isuzu Rodeo had been parked, Officer Lowrey saw a man in a black sweatshirt or jacket walking across a field, coming up from the river. *Id.* Officer Lowrey realized that he was in the area where a man matching that description had eluded county deputies the night before. *Id.* at 116.

The officer turned around and contacted the man, identifying him as Victor Whalen. *Id.* at 113-14, 117-18. Whalen was dripping wet and had grass all over him. *Id.* at 118. Whalen told Officer Lowrey several different stories about what he was doing; his story changed a bit each time he explained. *Id.* at 117. Whalen first indicated that he was wet because it was raining. *Id.* at 118. When the officer pointed out that it had just started sprinkling, Whalen said he had been looking for a fishing spot by the river and had fallen in. *Id.* at 119. Whalen later maintained that he was wet because the grass was wet, but Whalen was too drenched to have

been wet from grass alone. *Id.* Officer Lowrey detained Whalen and called the sheriff's office to have someone pick him up.

Deputy Zimmerman arrived and took Whalen into custody. *Id.* at 125. Searching him incident to arrest, Dep. Zimmerman found a car key on his person. *Id.* Dep. Zimmerman also took photographs of Whalen as he was booked into jail, which showed the sweatshirt Whalen was wearing when apprehended. *Id.* at 126-27. Dep. Taylor, the deputy who had seen the suspect run from the Isuzu Rodeo, identified Whalen's striped sweatshirt as the one the suspect had been wearing. *Id.* at 96-97. After Whalen was arrested, Dep. Taylor spoke to him at the jail. *Id.* ay 97-98. Post-*Miranda*, Whalen admitted that the white car near the scene, to which the dog had led the deputies, was the one he had been driving. *Id.* at 98-99. Whalen also admitted that he had walked by the Isuzu Rodeo that same morning, although he did not admit attempting to steal it. *Id.* at 99, 94.

No fingerprints were found in the Isuzu Rodeo or the evidence taken from it. *Id.* at 133-35. However, the key found on Whalen's person, when given back to the registered owner of the white car towed from nearby, started that car. *Id.* at 135-36.

By way of background, Officer Lowrey testified that "punching" an ignition is one way to steal a car. *Id.* at 120-21. The person attempting to steal the car rams a screwdriver into the ignition so that the car will start without a key. *Id.* This is such a common method of car theft in Lewis County that officers sometimes jokingly refer to a screwdriver-punched ignition as a "Lewis County key." *Id.* Dep. Mauermann noted that he investigated the incident as an attempted car theft because of the tampering with the steering column, which was not consistent with someone merely wanting to steal items from inside the vehicle. *Id.* at 70-71.

The State charged Whalen with one count of attempted theft of a motor vehicle. Clerk's Papers (CP) at 1–3. After hearing the evidence, the jury was instructed on direct vs. circumstantial evidence, including the fact that the law treats the two as equally important. VRP (Aug. 15-16, 2012) at 157-58. The defense did not object to this instruction. *Id.* at 143. The jury convicted Whalen as charged. *Id.* at 189-91; CP at 26.

At sentencing, the State recommended the top of the standard range based on Whalen's high offender score. VRP (Sept. 4, 2012) at 2. Defense counsel asked for the bottom of the range based on residual doubt. *See id.* at 3-4. Whalen himself gave a

long allocution. *Id.* at 5-7. He first appealed to the judge socially, noting that his kids went to the school at which the judge coached basketball. *Id.* at 5. Later in his allocution, Whalen mentioned that the judge had known him since he was a teenager and had represented him at one point.[1] *Id.* at 6. This statement came in the context of Whalen discussing his juvenile criminal history, emphasizing that he stayed out of trouble for a long period of time after that point. *Id.* At the end of his allocution, Whalen asked the judge to go easy on him. VRP (Sept. 4, 2012) at 7. Making no reference to any prior social or professional contact with Whalen, the Court sentenced him to the top of the standard range, citing his criminal history. *Id.* at 7. Whalen timely appealed. *Id.* at 8-9, 11; CP at 41-52.

IV. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANT OF ATTEMPTED MOTOR VEHICLE THEFT.

1. Background And Standard Of Review.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. . . . [A]ll reasonable inferences from the evidence

[1] Whalen was born in January of 1966, so he was 46 years old at the time of sentencing. CP at 30.

must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citations omitted).

Circumstantial and direct evidence receive equal weight under this standard. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). This is especially true when, as here, the jury has been instructed on the point without objection by the defense. VRP (Aug. 15-16, 2012) at 143, 157-58 (jury instruction); *State v. Trout*, 125 Wn. App. 403, 420, 105 P.3d 69 (Div. 3 2005) ("The jury is presumed to follow the court's instructions."); *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) (noting that unobjected-to jury instructions become law of the case).

2. The Evidence Clearly Supported The Jury's Conclusion That The Defendant Attempted To Steal A Motor Vehicle.

As charged in this case, the elements of attempted motor vehicle theft were that, on or about June 12, 2012 in Lewis County, Washington, with intent to wrongfully obtain a motor vehicle of another and deprive the other of that vehicle, the defendant took a substantial step towards committing this intended theft. VRP (Aug.

15-16, 2012) at 158-59 (jury instructions); CP at 1-3 (information); *accord* RCW 9A.56.065; RCW 9A.56.020(1)(a); RCW 9A.28.020(1).

The evidence here showed that, on June 12, 2012 at 1:30 a.m. in Lewis County, Washington, a suspect wearing a striped sweater was seen running from Mr. Leventon's vacant Isuzu, which had been broken into and had its ignition punched in a manner commonly used to steal cars. VRP (Aug. 15-16, 2012) at 18, 56-57, 70-71, 76-77, 81–85, 120-21. The suspect ran as soon as a police officer approached despite commands to stop, disappearing into the swamp. *Id.* at 82-87. A dog track led from the area of the accident to a seemingly abandoned white car nearby. *Id.* at 87-89, 104-07. A few hours later, a police officer found Whalen near the scene of the break-in, wearing the same striped sweater as the suspect. *Id.* at 96-97; 113-18; 126-27. In his pocket was a key to the white car to which the dog led the deputies. *Id.* at 125; 135-36. Whalen gave inconsistent and sometimes nonsensical explanations for why he was walking, drenched and covered in grass, in the area. *Id.* at 117-19. Whalen later admitted that the white car was his and that he had been near the Isuzu. *Id.* at 94, 98-99, 120.

Taking this evidence in the light most favorable to the State, a reasonable jury could easily infer that Whalen had parked the white car nearby, broken into the Isuzu, and tampered with the car's steering column so he could steal it. Dep. Taylor interrupted him, whereupon he ran into the swamp and hid for a few hours. Whalen emerged wet and covered in grass, and lied to Officer Lowrey in an attempt to explain his presence. This story explains Whalen's being by the Isuzu at a late hour, his flight, the evidence within the Isuzu, the dog track to the white car, Whalen's possession of the white car's key, his presence in the area a few hours after the break-in, his appearance at that time, his lousy alibis, and his admission to being near the Isuzu.

Consequently, the jury was entitled to conclude that Whalen intended to steal the Isuzu and broke into it in an attempt to do so, i.e., that Whalen intentionally took a substantial step towards a motor vehicle theft. The Court should affirm his conviction.

B. THE COURT SHOULD DECLINE TO CONSIDER WHALEN'S APPEARANCE-OF-FAIRNESS CLAIM, RAISED FOR THE FIRST TIME ON APPEAL.

At sentencing, Whalen stated that his kids went to the school at which the judge coached basketball, and that the judge had known him since he was a teenager and had represented him.

VRP (Sept. 4, 2012) at 5-6. No evidence supported these assertions; neither the judge nor anyone else made any reference to them whatsoever. *See id.* at 1-12. For the first time on appeal, Whalen argues that the trial judge's failure to recuse himself violated the appearance-of-fairness doctrine. But, an appearance-of-fairness claim may not be raised for the first time on appeal because it is not of "constitutional magnitude." What's more, the alleged error is not "manifest": the record does not demonstrate that the judge was or appeared to be biased. The Court should therefore decline to consider Whalen's appearance-of-fairness claim for the first time on appeal.

1. Background And Standard Of Review.

An appellate court may refuse to hear almost any claim of error not raised at trial unless it is a manifest error affecting a constitutional right. RAP 2.5(a). This rule forces litigants to raise issues at trial, when they may be corrected. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An appellant claiming error for the first time on appeal must first demonstrate that the error is "truly of constitutional dimension." *Id.* Next, the appellant must show that the error actually prejudiced him. *Id.* at 99. If the facts necessary to show prejudice are not in the record, the error is not manifest. *Id.*

The question is whether the error is "so obvious on the record that [it] warrants appellate review." *Id.* at 100. Even a manifest constitutional error is subject to a harmless error analysis. *Id.* at 99.

2. Appearance-Of-Fairness Claims Are Not Of Constitutional Magnitude And May Not Be Raised For The First Time On Appeal.

Appearance-of-fairness claims are not of constitutional magnitude. *In re Guardianship of Cobb*, 172 Wn. App. 393, 404, 292 P.3d 772 (Div. 2, 2012); *see also City of Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978) ("Our appearance of fairness doctrine, though related to concerns dealing with due process consideration, is not constitutionally based."). As a result, such a claim may not be raised for the first time on appeal. RAP 2.5.

Interpreting RAP 2.5, *State v. Morgensen*, 148 Wn. App. 81, 197 P.3d 715 (Div. 2, 2008) determined that the defendant could not raise an appearance-of-fairness claim for the first time on appeal, despite the sentencing judge's explicit reference to personally knowing and previously representing the defendant:

> The doctrine of waiver applies to bias and appearance of fairness claims. *See, e.g.*, *State v. Bolton*, 23 Wn. App. 708, 714, 598 P.2d 734 (1979) (we refused to consider appearance of fairness issue raised for first time on appeal), *review denied*, 93 Wn.2d 1014 (1980); *In re Welfare of Carpenter*, 21

> Wn. App. 814, 820, 587 P.2d 588 (1978) ("[A] litigant who proceeds to trial knowing of potential bias by the trial court waives his objection and cannot challenge the court's qualifications on appeal"). Here, Morgensen was aware of the potential for bias because he knew that the trial judge was his former defense counsel. And he would have been entitled, as a matter of right, to a different judge upon the filing of a timely motion and affidavit of prejudice. RCW 4.12.050; *Carpenter*, 21 Wn. App. at 820. But Morgensen did not object to his former defense counsel being the trial judge on this unrelated charge and, therefore, waived this issue. Trial counsel cannot stay silent to preserve an issue for possible future appeal. *City of Seattle v. Harclaon*, 56 Wn.2d 596, 597, 354 P.2d 928 (1960).

Morgensen, 148 Wn. App. at 86, 90-91 (footnote omitted). Whalen's claim is identical to Morgensen's. This Court should decline to consider it for the first time on appeal, and should affirm Whalen's conviction.

3. Whalen's Appearance-Of-Fairness Claim Is Not "Manifest."

Whalen's alleged violation of the appearance of fairness is also not "manifest" from the record. In context, Whalen appears to have been saying that the judge represented him when he (Whalen) was a juvenile. VRP (Sept. 4, 2012) at 6. Whalen was 46 years old at the time of sentencing, *see* CP at 30, so the alleged representation would have been almost thirty years before. No evidence or other reference to this claim, or to Whalen's kids'

basketball-coaching connection to the judge, appears in the record. *See* VRP (Sept. 4, 2012) at 1-12. Nor does the record suggest that the judge, the parties, or anyone else knew about these alleged connections to the defendant.

In short, nothing in the record indicates that Whalen's statements were true or that an objective observer would have believed it unfair for the judge to handle Whalen's trial and sentencing. On the contrary, Whalen appealed to the judge personally to ask for leniency, suggesting that the situation was to his advantage. *Id.* at 6-7. Because the record does not make it obvious that Whalen suffered actual prejudice, the claimed error is not manifest. *O'Hara*, 167 Wn.2d at 99-100. The Court should decline to consider it and should affirm Whalen's conviction.

I. NO APPEARANCE-OF-FAIRNESS VIOLATION OCCURRED, OR ANY SUCH ERROR WAS HARMLESS.

As explained above, the record reveals no reason to believe that the trial judge actually had some personal connection to the defendant, or that the judge knew about any connection that existed. The judge would therefore have had no reason to recuse. True, a judge must disqualify him- or herself if that judge's impartiality may be reasonably questioned. *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (Div. 2 2009).

But, the "reasonably questioned" test is an objective one that assumes the reasonable person knows and understands all the relevant facts. *Sherman v. State*, 128 Wn.2d 164, 205–06, 905 P.2d 355 (1995). The party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias. *State v. Gamble*, 168 Wn.2d 161, 187–88, 225 P.3d 973 (2010). Because no evidence was elicited concerning the judge's supposed involvement with the defendant, the reasonable observer would have heard only that the judge may have represented the defendant around thirty years before. That hardly would call the judge's impartiality into question. No violation of the appearance-of-fairness doctrine occurred.

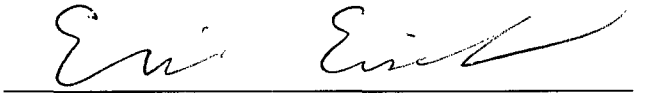
Even if one had occurred, however, Whalen received a standard-range sentence based solely on his criminal history exceeding 9 points. VRP (Sept. 4, 2012) at 2, 7. He cannot demonstrate any prejudice from this sentence, which was within any judge's discretion and which followed logically from Whalen's history being above the top of the scale. As a result, even if an onlooker might have questioned the judge's impartiality, the error was harmless. The court should affirm Whalen's conviction.

V. CONCLUSION

The Court should reject Whalen's claim that the evidence was insufficient and that the judge's alleged personal connection to Whalen undermined the appearance of fairness. The evidence demonstrated that Whalen broke into a car in an attempt to steal it, which sufficed to prove attempted motor vehicle theft. Whalen's appearance-of-fairness claim may not be raised for the first time on appeal; moreover, the record does not support the claim, let alone make it manifest. The Court should affirm Whalen's conviction.

RESPECTFULLY SUBMITTED this 15 of April, 2013.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

BY: 

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. VICTOR WHALEN, Appellant.	)	NO. 43915-8-II DECLARATION OF MAILING

Ms. Teri Bryant, paralegal for Eric Eisenberg, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On April 16, 2013, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

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DATED this 16th day of April, 2013, at Chehalis, Washington.

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